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No. 80-185

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KLIPPAN, GmbH, *Petitioner*,

v.

VOLKSWAGEN OF AMERICA, INC., *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

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QUESTIONS PRESENTED

Did the decision of the Court below violate the Petitioner's right to due process of law?

Did the Alaska Supreme Court fail to comply with the recent decision of this Court in *World-Wide Volkswagen Corporation* v. *Woodsen*?

Should the decision below be reversed to ensure that international commerce is not burdened by a requirement that a product constitute its manufacturers worldwide agent for service of process, at least in a commercial context where no local citizen is a party and where the merits of the dispute are being litigated in an appropriate forum freely chosen by the parties?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

Petitioner, Klippan, GmbH, respectfully requests that a writ of certiorari issue to review an order of the Supreme Court of the State of Alaska dated May 9, 1980 (App. A) a final decree with respect to the question involved.

OPINIONS BELOW

The relevant opinions are both unreported, and are attached as appendices as follows:

APPENDIX A — Supreme Court, Order, dated May 9, 1980, in *Volkswagenwerk, A.G.* and *Volkswagen of America, Inc.*, v. *Klippan, GmbH.*

APPENDIX B — Superior Court, Decision, dated September 15, 1978, in *Volkswagenwerk, A.G.* and *Volkswagen of America, Inc.*, v. *Klippan, GmbH, Allied Chemical Corporation,* and *Everett Dale Vaughn.*

JURISDICTION

The opinion of the court below was entered on May 9, 1980 and is a final decree rendered by the highest court of the State of Alaska.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The relevant provision of the United States Constitution in this suit is Amendment XIV, §1. The relevant statutory provision is the Alaska Long-Arm Statute, AS 09.05.015. These provisions are set forth in Appendix C.

This petition seeks review of a judgment of the Supreme Court of the State of Alaska filed May 9, 1980 affirming (with respect to the jurisdictional aspects) a decision by the Superior Court of the State of Alaska, Third Judicial District at Anchorage, based upon Alaska's long-arm statute extending jurisdiction of that state's courts over non-residents.

STATEMENT OF THE CASE

The Petitioner, Klippan, GmbH (hereinafter "Klippan"), is a company incorporated in the Federal Republic of Germany with its principal offices in Hamburg, West Germany. Klippan is a manufacturer of seat-belt restraint systems that are used in automobiles by automobile manufacturers, including Volkswagenwerk, A.G. (hereinafter "Volkswagenwerk"). The seat-belt restraint system which is central to this litigation was manufactured in Germany in 1966 and acquired by Volkswagerwerk, from Klippan, pursuant to Volkswagenwerk purchase order No. 4644 dated April 28, 1966.

Volkswagenwerk and its wholly owned American subsidiary, Volkswagen of America, Inc. (hereinafter "Volkswagen of America") marketed in the United States automobiles that incorporated the subject seat-belt restraint system manufactured by Klippan using a buckle mechanism manufactured by and purchased from Broderna Holmbergs Fabriks, A.D., a Swedish corporation. The development of the subject seat-belt buckle was the result of over a year of concentrated negotiations between Klippan and Volkswagenwerk. Klippan contends that the entire seat-belt restraint system for use in the subject automobile involved collaboration between Klippan and Volkswagenwerk and was done in strict accordance with the specific demands of Volkswagenwerk. Though Volkswagenwerk admits its involvement in the preparation of drawings of the seat-belt restraint systems, it disclaims involvement with the development process.

The relationship between Klippan and Volkswagenwerk was one of contract, and that contract was negotiated, executed and performed in the Federal

Republic of Germany. The contract is written in German and specifies that all disputes arising out of Volkswagenwerk's orders must be brought before the competent German court designated therein. Moreoever, the contract between Volkswagenwerk and Volkswagen of America whereby title was transferred in Germany to Volkswagen of America provides that all disputes are to be resolved in the same German forum. Further, those involved in the design of the seat-belt buckle, the manufacture of the seat belt, the installation of the seat belt, Volkswagenwerk inspectors and engineers involved in the evaluation of the seat belt and buckle, and the companies with patents on it and other buckles are European nationals not present within the United States.

The mechanism by which Volkswagen automobiles reach the United States involved sales by Volkswagenwerk, to Volkswagen of America in Germany and subsequent resales by Volkswagen of America to any of its fourteen (14) regional United States distributors which, in turn, marketed the vehicles to their local dealers. The subject vehicle was originally sold at retail in Ogden, Utah and eventually arrived in Alaska.

On December 24, 1972, Dr. Charles R. Munns allegedly sustained severe injuries when he was involved in an automobile accident while driving his type one 1967 Volkswagen Beatle. On September 6, 1974, Dr. Munns brought suit against Volkswagenwerk, Volkswagen of America and the driver of the other vehicle involved in the collision, Everett Dale Vaughn. Trial commenced on or about September 6, 1976, and led to a jury verdict rendered on October 22, 1976 in which the three defendants were found liable for the injuries of Dr. Munns. That decision was appealed to the Alaska

Supreme Court but settled prior to argument there. Thus, the claims of Dr. Munns have been totally satisfied.

The action below was brought by Volkswagenwerk and Volkswagen of America against Klippan and Allied Chemical Corporation, its parent corporation, seeking contribution and/or indemnity for amounts paid by the plaintiffs to Dr. Munns. Plaintiffs contend that a seat-belt restraint system acquired by Volkswagenwerk from Klippan was the sole cause of the alleged injuries sustained by Dr. Munns and forms the sole basis upon which the jury rendered the verdict against Volkswagenwerk and Volkswagen of America in October of 1976. They further allege that Allied Chemical Corporation, as the present parent corporation of Klippan, is responsible for the actions of its subsidiary. This despite the fact that Allied Chemical did not acquire Klippan until 1971, some five years after the sale of the subject seat belt.

Defendants Klippan and Allied Chemical Corporation have denied plaintiffs' allegations that the seat-belt restraint system was defective, and further have contended that Volkswagenwerk dominion over the design process was so pervasive as to render Volkswagenwerk responsible and liable for any defects that may have existed in that design. While the other driver, Mr. Vaughn, was originally a defendant in this suit, it was voluntarily dismissed as to him when Dr. Munns' claim was settled and thus he, too, has no further interest in the case.

It should be noted that Klippan, relying upon the forum selection clause in purchase order 4644, instituted an action against Volkswagenwerk in the designated German forum asking that court, applying German law,

to decide what obligations, if any, Klippan may have to Volkswagenwerk in connection with the very dispute which is the subject matter of this litigation. Since Klippan contends that it has a right of indemnification against the Swedish company which manufactured and sold the principal components of the buckle, it has impleaded that company into the pending German action.

On July 27, 1978, Klippan filed motions in the Superior Court, Third Judicial District, State of Alaska, seeking an order dismissing the complaint against Klippan on the basis of (1) lack of personal jurisdiction over Klippan, (2) pursuant to a forum selection clause providing exclusive venue in the Federal Republic of Germany for disputes between Klippan and Volkswagenwerk and on the basis of (3) forum non conveniens. By a decision rendered on September 15, 1978, the Superior Court determined that jurisdiction over Klippan existed, but dismissed the action on the basis of the forum selection clause. A decision on the forum non conveniens issue was not reached in that opinion.

Volkswagenwerk and Volkswagen of America appealed the Superior Court decision on the forum selection clause and Klippan cross-appealed the decision with respect to its jurisdictional determination. In an opinion dated May 9, 1980, the Supreme Court of the State of Alaska affirmed with respect to jurisdiction over Klippan in Alaska, and also affirmed the dismissal of the claims of Volkswagenwerk on the basis of the forum selection clause. However, the claims of Volkswagen of America against Klippan, were allowed to remain in Alaska on the grounds that the allegedly forseeable presence there of *one* of Klippan's products, sold and resold in Germany, entered into the United States as a component part of a vehicle, sold again to a consumer

in Utah and present in Alaska due to the fortuitous choice of the purchaser, was sufficient contact to justify the exercise of jurisdiction over Klippan in a suit not involving the person allegedly injured by the product or any other citizen of Alaska.

Klippan brings this appeal from the decision that jurisdiction can be asserted over it consistent with the due process clause of the Fourteenth Amendment to the United States Constitution.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Court Below Violated The Petitioner's Right To Due Process Of Law

This litigation is not a typical products-liability action in which an injured consumer is attempting to enforce a remedy against the distant manufacturer without the burden of traveling to a distant forum. Rather, it is an action in which a large German corporation and its wholly owned American subsidiary have attempted to assert jurisdiction over another German corporation in a distant forum unconnected with any of the present parties or the transactions underlying the dispute between them. The court below found that Klippan had sufficient minimum contacts with the State of Alaska by reason of the sale in Germany of the subject lap-restraint system to Volkswagenwerk with knowledge that Volkswagenwerk would market vehicles incorporating the system within the United States.

It should be emphasized that this seat-belt restraint system did not reach Alaska or the United States by way of direct commerce involving Klippan; rather, it reached the United States by way of Volkswagen's own distribution network and the random activities of a subsequent

purchaser of the vehicle. Jurisdiction is, thus, asserted over Klippan based on the chance presence of one of its buckles in this state as one component of the Munns' vehicle.[1] Volkswagen would apparently subject Klippan to personal jurisdiction in any country in the world that it chooses as a market for automobiles that incorporate a component part manufactured by Klippan.

However minimal the burden of defending in a forum court, a defendant may not be called upon to do so unless he has the requisite minimum contacts. *Hanson* v. *Denckla,* 375 U.S. 235 (1958); *Shaffer* v. *Heitner,* 433 U.S. 186 (1977). In order to establish those minimum contacts, the defendant must have done some act by which he purposefully availed himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of the laws of that state. *Hanson* v. *Denckla, supra.* The Supreme Court of Alaska conceded in its opinion that Klippan had no direct contacts with the State of Alaska but held that minimum contacts existed nonetheless. Certiorari should be granted to correct the decision of the court below and to emphasize that a state may not compel jurisdiction in a case where none of the parties have any contact whatsoever with the forum state.

The extent to which a long-arm statute can be utilized to assert jurisdiction over an alien defendant in a case in which none of the parties have even qualified to do business is important not only in the State of Alaska but for international commerce generally since

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[1] Volkswagen failed to establish in the action below that any Klippan seat belts other than the one involved in this action ever reached the State of Alaska. Thus, the record is barren of any proof that any Klippan product was ever sold or marketed in Alaska.

other states have similar long-arm statutes. This Court has in the past looked to the interests of the state in providing a remedy for an injured party as an important factor in jurisdictional determinations. *McGee* v. *International Life Insurance Company,* 35th U.S. 220 (1957). Compelling state interests as described in *McGee* are not present when the litigation involves neither an injured person nor any resident of the state in which jurisdiction is asserted.[2] Klippan does not suggest that it should not be subject to jurisdiction here merely because it is a foreign corporation but, rather, argues that the circumstances under which these plaintiffs are asserting jurisdiction go far beyond the limits permitted by due process. Alaska does not have the constitutional power to assert jurisdiction in this case.

II. The Alaska Supreme Court Failed To Comply With The Recent Decision Of This Court In World-Wide Volkswagen Corporation v. Woodsen.

The decision of the Supreme Court of the State of Alaska would permit jurisdiction over a non-resident defendant in cases where the defendant performed no purposeful act by which he availed himself of the privilege of conducting activities within the forum state. The court below, while recognizing that Klippan has not performed a single act within the State of Alaska, concluded that jurisdiction could be asserted by virtue of its sale, in Germany, of seat belts to a giant corporation

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[2] Indeed, the Volkswagen entities themselves are not even qualified to do business in the State of Alaska, and each asserted lack of personal jurisdiction as a defense to the original action of Dr. Munns.

that distributed its vehicles worldwide. That proposition goes too far, and would permit the plaintiffs themselves to subject Klippan to jurisdiction anywhere in the world by virtue of their own marketing decisions.

This Court's decision in *World-Wide Volkswagen Corporation* v. *Charles S. Woodsen,* 100 S.Ct. 559 (1980), requires a reversal of the court below. In that case, this Court stated (100 S.Ct. at 566):

> Yet "foreseeability" alone has never been a sufficient benchmark for personal jurisdiction under the due process clause . . .
>
> This is not to say, of course, that foreseeability is wholly irrelevant. But *the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state.* Rather, *it is that the defendant's conduct in connection with the forum state is such that he should reasonably anticipate being held into court there* . . . .
>
> It is foreseeable that purchasers of automobiles sold by World-Wide and Seaway may take them to Oklahoma. But the mere "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state." [emphasis added]

The court below attempted[3] to distinguish the *World-Wide Volkswagen* case by determining that Klippan knew or had reason to know that its seat belts *could* be distributed and sold for use in Alaska. That deter-

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[3] The Munns vehicle was never sold in Alaska. Nor does the record reflect that any product of Klippan was ever sold in Alaska. The Alaska Supreme Court's decision is, thus, grounded on a mere use of one product within that State.This constitutes the appointment of the product as agent for service of process — a practice specifically condensed in *World-Wide Volkswagen* and a fundamental error of law.

mination disregards this Court's requirement that the defendant's conduct be such that "he should reasonably anticipate being held into court [in Alaska]." Klippan had no basis to know that a single one of its seat-belt restraint systems would in fact reach the State of Alaska, just as it had no reason to know that its products would be used in all of the states of the United States if, in fact, that were true.

The assertion of long-arm jurisdiction against Klippan in this case would impose an extreme burden upon it by compelling it to defend in a distant forum, indeed, on a distant continent. Surely that burden outweighs the interest of non-resident plaintiffs in suing locally and the interest of the State of Alaska in providing a remedy in a suit in which no Alaska party is involved. Adequate remedies are available and are now being pursued in a more convenient forum in Germany. Due process requires that the assertion of jurisdiction be reasonable and, where a non-resident defendant has performed no act to avail itself of the protection of the laws of the state, it is unreasonable for jurisdiction to be required in that State. Certainly, the fundamental, constitutional dimensions of this requirement should not be lightly glossed over by after the fact pronouncements as to whether or not a particular hypothetical was foreseeable some fourteen years ago.

The *World-Wide Volkswagen* opinion reaffirmed that assertions of jurisdiction must be reasonable considering the burdens imposed upon the defendant. Petitioner has raised significant issues of German law relating to a contract negotiated, executed and performed in Germany. Trial of the suit below will involve the examination of numerous German nationals raising questions as to the power of the courts of the State of

Alaska to compel attendance. It is a suit that involves consideration of numerous documents written in the German language and located in the Federal Republic of Germany. The problems with translation are significant and, aside from the expense, there have already been disputes concerning the accuracy of translations submitted to the courts in Alaska. By applying Alaska's long-arm statute to Klippan in this case, the Supreme Court of Alaska has violated the Petitioner's constitutional right of due process of law and placed it in a position in which it may not be able to adequately defend itself nor gain access to the witnesses and information required for its defense.

III. The Decision Below Must Be Reversed To Ensure That International Commerce Is Not Burdened By A Requirement That A Product Constitute Its Manufacturers Worldwide Agent For Service Of Process, At Least In A Commercial Context Where No Local Citizen Is A Party And Where The Merits Of The Dispute Are Being Litigated In An Appropriate Forum Freely Chosen By The Parties.

Some thirty-five years ago, in *International Shoe Company* v. *Washington,* 326 U.S. 310 (1945), this court established the basic principles that have since guided judicial inquiry in jurisdictional cases. Refinements were necessary over the years to insure that lower courts did not exceed the constitutional requirements necessary in order to preserve due process for non-resident defendants held to jurisdiction in various states. *Hanson* v. *Denckla, supra.* Nonetheless, courts continued to expand the basis on which they would permit assertion of jurisdiction, and statute after

statute was construed to extend jurisdiction to the full extent permissible consistent with due process.

In *Shaffer* v. *Heitner, supra,* this court reaffirmed the requirements set forth in *International Shoe,* and made clear that due process required that the requisite minimum contacts with the forum state be demonstrated. The state courts, however, remained reluctant to accept the continuing validity of jurisdictional limits, and soon exceptions were engrafted upon the rule. The United States Court of Appeals for the Second Circuit gave its approval to one such exception in *Minichiello* v. *Rosenberg* (CA2 1968), 410 F.2d 106, adhered to en banc, 410 F.2d 117, cert. denied, 396 U.S. 844, 24 L.Ed.2d 94, 90 S.Ct. 69 (1969). This court acted to correct that situation in *Randal Rush et al.* v. *Jeffrey,* 100 S.Ct. 571 (1980).

Now this court must again reaffirm the fundamental principles set forth in *World-Wide Volkswagen* v. *Woodsen, supra.* Almost immediately, lower courts have attempted to make exceptions to such principles. This court must act and reverse the decision below to preserve the fundamental constitutional rights involved and avoid allowing exceptions so broad that states are effectively without constitutional limits in their exercise of jurisdiction over foreign component parts manufacturers which are not sold in the state but which may happen to be used there.

If a foreign manufacturer of a component of a mobile product destined for the United States market thereby submits to the jurisdiction of all fifty states (since it could be *used* in any one of them) then that principle should be clearly established. Petitioner submits, however, that this is not the law.

The distinction between sales or marketing and use is important since proponents of expansive jurisdictional rules often seek to justify unfair applications by arguing that the manufacturer could have avoided the result by refraining from sales to a particular forum. Whatever the merits of that argument in some domestic situations, it is without force in a context where a manufacturer supplies a component for sale to another manufacturer who independently selects appropriate markets in different countries. Moreover, here the parties have actually utilized that rationale in another way. Rather than resorting to unrealistic attempts to impose marketing or use restrictions on the product they have agreed, between themselves, that wherever a dispute might arise they would resolve it in the West German Court so familiar to all of them. Rather than restrict the sales or use of the products they have restricted the available forum.

It is apparent upon analysis that the gravamen of this dispute — the design, development and manufacture of the subject seat belt — involves only the parties to the ongoing German litigation. Courts in both Germany and Alaska have ruled that the forum selection clause requires that dispute to be litigated there and that is precisely what is being done. Any litigation elsewhere is clearly derivative in nature as well as redundant. Petitioner submits that the totality of these circumstances require a finding that the exercise of jurisdiction over Klippan in this case is unreasonable, and therefore unconstitutional, as a matter of law.

CONCLUSION

This case presents to the Court an opportunity to rule on the constitutional dimensions of the area in which a long-arm statute can be utilized in international commerce to assert jurisdiction over a foreign defendant where none of the parties to the suit are residents in the state in which the suit is filed and where the parties have previously made their own, venue choices. Misuse of the long-arm statutes in this area can result in greater unfairness to a foreign defendant, and can be used as a tactic by which an adequate defense can be inhibited and/or prevented. The expense and hardship imposed upon the foreign defendant in this case has resulted in a situation requiring correction by this Court, and provides an opportunity to set fundamental guidelines in the increasingly important area of international trade. This Court should grant the writ in order to avoid the deprivation of due process imposed upon Klippan and to establish a uniform policy for the exercise of international jurisdiction in similar cases.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted

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Attorneys for Petitioner

APPENDIX

APPENDIX A

THE SUPREME COURT OF THE STATE OF ALASKA

File No. 4336, 4368

VOLKSWAGEN WERK, A.G. and VOLKSWAGEN OF AMERICA,
Appellants and Cross-Appellees,

v.

KLIPPAN, GmbH,
Appellee and Cross-Appellant.

Opinion

[No. 2080 - May 9, 1980]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Peter J. Kalamarides, Judge.

Appearances: David H. Thorsness, Hughes, Thorsness, Gantz, Powell & Brundin, Anchorage, for Appellants and Cross-Appellees. Joseph L. Young, Atkinson, conway, Young, Bell & Gagnon, Inc., Anchorage, and Theodore R. Dunn, Dunn, Bailey & Mason, Anchorage, for Appellees and Cross-Appellants.

Before: Rabinowitz, Chief Justice, Connor, Boochever, and Burke, Justices and Dimond, Senior Justice. [Matthews, Justice, Not Participating]

RABINOWITZ, Chief Justice.

On December 24, 1972, Dr. Charles R. Munns suffered injuries in an automobile accident while driving his 1967 model Volkswagen Beetle. Dr. Munns subsequently brought suit to recover for his injuries against the offending driver, the manufacturer of the Munns vehicle, Volkswagenwerk, A.G. (VWAG) and its importer, Volkswagen of America, Inc. (VWoA).

The only claim submitted to the jury against the defendants was that the original equipment seat belt in the vehicle

was defective and that the defect was a proximate cause of Dr. Munns's injuries. The manufacturer and supplier of the seat belt, Klippan, GmbH (Klippan), was eventually asked by VWAG to participate in the defense of the case following pretial conference, but Klippan refused. Klippan also rejected a tender of the defense of the Munns case by VWAG and VWoA. One of Klippan's safety engineers did assist VWAG and VWoA in the preparation of the Munns case and served as an expert witness, although Klippan maintains he did not do so as a representative of Klippan.

The jury awarded a verdict against all three defendants in the Munns case, and judgment in the amount of approximately $9,300,000 was entered. While the case was on appeal to this court a settlement in the amount of $5,015,000 was negotiatied between the defendants and Dr. Munns.

After entry of the judgment in the Munns case, the instant action was brought in Alaska by VWAG and VWoA against Klippan and its parent corporation, Allied Chemical Corporation, seeking payment of all or part of the judgment on contractual grounds and under statutory and equitable principles[1] of indemnity and contribution. Klippan then filed a declaratory judgment action against VWAG in Germany in which it sought a determination of what obligations, if any, it owed to VWAG under German law as a result of the Munns accident. Among the affirmative defenses which Klippan asserted in the Alaska action were that the superior court lacked personal jurisdiction over Klippan, and that a forum selection clause contained in the contract by which Klippan supplied seatbelt restraint systems to VWAG limited litigation exclusively to a German forum. The superior court determined that jurisdiction over Klippan existed, but dismissed the contribution and indemnity action on the basis of the forum

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[1] Everett D. Vaughn, driver of the other vehicle in Dr. Munns's accident, was originally joined as a defendant but was dismissed from the action with prejudice by stipulation of the parties, after settlement with Dr. Munns.

selection clause. On cross-appeal, Klippan challenges the superior court's jurisdictional determination.

I. Superior Court's Jurisdiction as to Klippan

We affirm the superior court's ruling regarding its jurisdiction as to Klippan. Personal jurisdiction over a foreign or out-of-state defendant whose products cause injury to persons or property within this state is conferred by AS 09.05.15, Alaska's "long-arm" statute. We have construed this statute to extend Alaska's jurisdiction to the maximum reach consistent with the guarantees of due process under the Fourteenth Amendment, *Jonz* v. *Garrett/Airsearch Corp.*, 490 P.2d 1197 (Alaska 1971). Thus the sole question which must be addressed in regard to this specification of error is whether the application of Alaska's "long-arm' statute to Klippan in the circumstances of this case is in violation of due process.

In order to meet due process standards personal jurisdiction over a non-resident defendant requires certain minimum contacts with the state "so that maintenance of the suit does not offend traditional notions of fairplay and substantial justice." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 90 L. Ed. 95 (1945). When a manufacturer voluntarily places its product in the general stream of commerce without restriction, the "minimum contact" requirement is satisfied in all forums where it is foreseeable to the manufacturer that the product may be marketed. *Commodities World Int'l. Corp.* v. *Royal Mile, Inc.*, 440 F. Supp. 1373, 1378-79 (D.C. Puerto Rico 1977); *Gray* v. *American Radiator & Standard Sanitary Corp.*, 176 N.E.2d. 761 (Ill. 1961). The "stream of commerce" doctrine has been adopted by the majority of American jurisdictions having long-arm statutes.[2] In *Modern*

[2] See, e.g. *Duple Motors Bodies, Ltd.* v. *Hollingsworth*, 417 F.2d 231, 235 (9th Cir. 1969) (applying Hawaii law); *Sells* v. *International Harvester Co., Inc.*, 513 F.2d 762, 763 (5th Cir. 1975) (Alabama law); *Thorton* v. *Toyota Motor Sales U.S.A.*, 397 F. Supp. 476, 482 (N.D. Ga. 1975), (Georgia law); *Look* v. *Hughes Tool Co.*, 367 F. Supp. 1003, 1006 (D.N.H. 1973) (New Hampshire

Trailer Sales, Inc v. *Traweek*, 561 P.2d 1192, 1196 (Alaska 1977), quoting *Jones Enterprises,* v. *Atlas Service Corp.*, 442 F.2d 1136, 1140 (9th Cir. 1971) we indicated our approval of the stream of commerce rule.

In our view Klippan has sufficient minimum contacts with the State of Alaska, by deliberately placing their seat belt restraint system in the general stream of commerce, to meet due process standards for personal jurisdiction. Klippan has sold millions of seat belt assemblies for incorporation into automobiles it knew were destined for purchase by consumers throughout the United States. Alaska law required installation of lap belts in all automobiles sold in this state during 1967, the model year of the Munns car.[3] Klippan represented by a label sewn on the belt involved in the Munns accident that its restraint systems were "approved for sale in all states," and took steps to insure that the belts complied with standards established by the American Society of Automotive Engineers. Klippan thus knew or had reason to believe that its seat belts could be distributed and sold for use in Alaska, and did not limit the sale or marketing of the restraint system in the United States. *See Keckler* v. *Brookwood Country Club*, 248 F. Supp. 645, 649 (N.D. Ill. 1965); *Commodities World Int'l.* v. *Royal Mile, Inc.*, 440 F. Supp. 1373, 1379 (D.C. Puerto Rico 1977); *Mann* v. *Frank Hrubetz & Co., Inc.*, 361 So.2d 1021, 1025 (Ala. 1978).

Klippan argues that the stream of commerce doctrine should not apply to the manufacturer of a component part of

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law); *Benn* v. *Linden Crane Co.*, 326 F. Supp. 995, 997 (E.D. Pa. 1971) (Pennsylvania law); *Alliance Clothing Ltd.* v. *District Court*, 532 P.2d 351, 354 (Colo. 1975) (en banc); *Edmundson* v. *Miley Trailer Co.*, 211 N.W.2d 269, 272 (Iowa 1973); *Cole* v. *Doe*, 258 N.W.2d 165, 168 (Mich. 1977); *Ehlers* v. *U.S. Heating & Cooling Mgr. Corp.*, 124 N.W.2d 824, 827 (Minn. 1963); *Certisimo* v. *Heidelberg*, 298 A.2d 298, 303 (N.J. Super. 1972); *aff'd. sub. nom. Van Eeuwen* v. *Heidelberg Eastern, Inc.*, 306 A.2d 79 (N.J. App. 1973).

[3] 13 AAC 04.270.

a product which is widely distributed by another entity. The modern trend of case law indicates otherwise where, as here, the component manufacturer deliberately designs its product in anticipation of it being widely marketed in American jurisdictions, and sells the component directly to several major auto producers with the knowledge that the component will be incorporated into their products and sold throughout America.[4] The fact that Klippan did not directly engage in business dealings in Alaska does not relieve it from answering for injuries which may result from use of its product in this state. It was entirely foreseeable to Klippan, from its own conduct, that a number of its restraint systems would be purchased by consumers in Alaska through normal sales and distribution patterns in the United States.[5] In this regard we have previously pointed out that the chain of distribution is not a significant factor in determining jurisdiction:

> We hold, as did . . . [*Gray*] . . . that the fact that some of the purchases were made from independent middlemen or that someone other than the manufacturer caused the product to be shipped into the state are not controlling factors.

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[4] As stated in *Dotterweich* v. *Yokohama International Corp.*, 416 F. Supp. 542, 550 n.11 (D. Minn. 1976):

> A party's status as a component part manufacturer does not in all instances foreclose the exercise of jurisdiction. Such an exercise of jurisdiction does not offend due process if minimum contacts are established.

[5] An affidavit submitted by VWoA states that about 600 Volkswagen vehicles were sold in 1967 by authorized dealers in Alaska "which would have been equipped with a seat belt of the type designed and manufactured by Klippan." Klippan asserts that VWAG procurred seat belts from more than one manufacturer during 1967, and so disputes that it is proven any Klippan-equipped Volkswagen actually reached Alaska other than Dr. Munns's car, which was originally purchased in Utah. This dispute does not alter our opinion with regard to the foreseeability to Klippan that a number of Klippan-equipped vehicles would be sold directly for use in Alaska through dealerships here and in other states.

Stephenson v. *Duriron Co.*, 401 P.2d 423, 429 (Alaska 1965), *cert. denied*, 382 U.S. 956, 15 L. Ed. 2d 360 (1965).[6]

We likewise reject Klippan's argument that the stream of commerce theory should not apply where the party attempting to assert jurisdiction is a non-resident corporation bringing an indemnity or contribution action separate from the original products liability lawsuit. Where a party is answerable in damages for injury occurring in this state, it is

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[6] We take note that a very recent United States Supreme Court case, *World Wide Volkswagen Corp.* v. *Woodson*, 48 L.W. 4079 (January 21, 1980), has indicated that " 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process clause." *Id.* at 4082. In that case, plaintiffs who had bought an Audi automobile in New York attempted to sue the automobile retail dealer and its wholesaler as well as the importer and manufacturer of the car (VWoA and VWAG) in Oklahoma, where they had an accident in the vehicle. The Supreme Court held that for Oklahoma to assert personal jurisdiction over the retail dealer and wholesaler would violate their due process rights, because both were New York corporations which had no business contacts with Oklahoma and which had not attempted in any way to market any cars in Oklahoma or otherwise derived benefit from Oklahoma's laws. To hold otherwise, stated the court, would mean "[e]very seller of chattels would in effect appoint the chattel his agent for service of process." *Id.* This is *not* in conflict with the principle we assert here, though. Klippan, in contrast to the local distributors sued in the *World Wide* case, has deliberately designed and placed its product with a manufacturing and sales organization which it knew would market its product throughout the fifty states. The *World Wide* opinion explicitly recognizes this distinction:

> Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its products in other states, it is not unreasonable to subject it to suit in one of those states if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum state does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state.

no more burdensome for that party to defend a separate indemnity action than to appear in the original suit.[7] The fact that the party seeking indemnity or contribution is a foreign corporation rather than the original injured plaintiff is not a justification for immunizing an ultimately responsible party from liability under the laws of the state where the injury occurred, *see, e.g., Washington* v. *U.S. Suzuki Motor Corp.*, 390 A.2d 1339, 1341 (Pa. Super. Ct. 1978); *Rovin Sales Co.* v. *Socialist Republic of Romania,* 403 F. Supp. 1298, 1302 (N.D. Ill, 1975); *See Stephenson* v. *Duriron Co.,* 401 P.2d 423, 429 (Alaska 1965). Inconvenience to at least some parties will probably be associated with litigation in either this jurisdiction or the German forum which Klippan prefers. It appears that legal doctrine, documents, exhibits, witnesses, and counsel from both Germany and Alaska may be involved in the action. Of the named parties, two are German and two

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[7] This conclusion holds true where the original defendant distributor of a defective product settles with the injured plaintiff and then seeks indemnity against the manufacturer after the originally injured party has been dismissed from the action. This situation occurred in *Ross* v. *Spiegel, Inc.*, 373 N.E. 2d 1288 (Ohio App. 1977), where the court stated:

> It is unfair that a defendant be able to insulate itself against personal jurisdiction in a state where an injury is caused by its product and where the goods were actually sold and used by selling its goods to a middleman distributor and washing its hands of any knowledge of where the goods are actually sold and used. For this reason, the 'stream of commerce' theory has evolved for holding a foreign manufacturer subject to personal jurisdiction in the state where a sale is made and a claim occurs, if that defendant places a substantial amount of goods into the flow of commerce in the United States so that it can reasonably be anticipated that part of the goods will be sold in the forum state. (citation) *The due process test of fair play and substantial justice is satisfied where the defendant, a large company, derives substantial sales revenues from the United States market place even though its sales are made outside the state of Ohio for distribution whereever the immediate purchaser of its product deems best.*

Id. at 1293 (emphasis added). *Accord, Sells* v. *International Harvester, Inc.*, 513 F.2d 762, 764 (5th Cir. 1975); *Beetler* v. *Zotos*, 388 F.2d 243, 246 (7th Cir. 1967), *rehearing denied,* 11968.

are American corporations. The original injury and underlying litigation occurred in this state. Under these circumstances, Alaska's jursdictional power must be upheld despite claims of inconvenience and unreasonableness by Klippan.

II. Forum Selection Clause and VWAG

We also affirm the superior court's enforcement of the forum selection clause against VWAG. The clause in question was drafted by VWAG, and incorporated as a part of the purchase order which served as the contractual agreement between Klippan and VWAG for the sale of Klippan's seatbelt assemblies to VWAG. The clause in translation reads:

> Venue for all disputes that may result from our orders is the court of competent jurisdiction for Wolfsburg.

The validity and interpretation of a forum selection clause is a question of first impression in Alaska. These clauses provide for the designation of a specific forum for the litigation of disputes between the parties to the agreement. They may take either of two forms generally. One type of clause denotes a consent to personal jurisdiction by the parties to a particular forum, but not to the exclusion of other forums; the other form of clause designates a forum as the mandatory, exclusive arena for the resolution of all disputes to which the clause applies, even though other courts might have personal jurisdiction over the parties. Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 Ky. L. J. 1, 5-7 (1976).

At common law, forum selection clauses were generally considered *per se* invalid on the grounds that a court's jurisdiction could not be contravened by an agreement between litigating parties or that they were against public policy. *See*, Reese, *The Contractual Forum: Situation in the United States*, 13 Am J. Comp. L. 187, 188 (1964). While many

courts still adhere to the common law rule,[8] the recent and favored trend is to apply a "reasonableness" test in determining whether to enforce such a clause, once it is concluded that it truly specifies a mandatory, exclusive forum for the litigation of the dispute in question.[9] This test has been expressed according to varying formulas.[10] The current status of the law

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[8] See e.g., *Fidelity Union Life Ins. Co.* v. *Evans,* 477 S.W.2d 535 (Tex. 1972); *Cartridge Rental Network* v. *Video Entertainment Inc.,* 209 S.E.2d 132 (Ga. App. 1974); *Fidelity and Deposit Co. of Md.* v. *Gainevile iron Works, Inc.,* 189 S.E.2d 130 (Ga. App. 1972).

[9] E.g., *M/S Bremen* v. *Zapata Offshore Co.,* 407 U.S. 1, 32 L. Ed. 2d 513 (1972); *Coppeweld Steel Co.* v. *Demag-Mannesmann-Bohler,* 578 F.2d 953, 964-966 (3rd Cir. 1978); *Leasewell, Ltd.* v. *Jake Shelton Ford, Inc.,* 423 F. Supp. 1011, 1015-1016 (S.D. W.Va. 1976). See Gilbert, *Choice of Forum Clauses in International and Interstate Contracts,* 65 Ky. L. J. 79 (1976); Collins, *Choice of Forum and the Exercise of Judicial Discretion, The Resolution of an Anglo-American Conflict,* 22 Int. and Comp. L.Q., 332, 338-343 (1973); Restatement (Second) of Conflict of Laws §80 (1971).

[10] The Model Choice of Forum Act, adopted in few states, provides the following criteria:

> SECTION 3. [Action in Another Place by Agreement]. If the parties have agreed in writing that an action of a controversy shall be brought in a court of another state and it is brought in a court of this state, the court will dismiss or stay the action, as appropriate, unless
>
> (1) the court is required by statute to entertain the action;
>
> (2) the plaintiff cannot secure effective relief in the other state, for reasons other than delay in bringing the action;
>
> (3) the other state would be a substantially less convenient place for the trial of the action than this state;
>
> (4) the agreement as to the place of the action was obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; or
>
> (5) it would for some other reason be unfair or unreasonable to enforce the agreement.

17 Am. J. Comp. 1. 293-96 (1969). See also, Gilbert, *supra,* at 30 n.164.

with respect to forum selection clauses in international commercial agreements, however, centers around *M/S Bremen* v. *Zapata Offshore Co.*, 407 U.S. 1, 32 L. Ed. 2d 513 (1972). The United States Supreme Court in that case stated:

> There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect . . . Manifestly much uncertainty and possible great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur . . . . The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade.
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> * * *
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> [I]t should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practicable purpose be deprived of his day in court. *Absent that there is no basis for concluding that it would be unfair, unjust or unreasonable to hold that party to his bargain.*

407 U.S. at 12-13, 18 32 L.Ed. 2d at 522-23, 525 (emphasis added). After placing this heavy burden in a party attempting to show that a forum selection clause is unreasonable, the Supreme Court in *Bremen* approved of voiding such a clause on public policy grounds:

> A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.

407 U.S. at 15, 2L. Ed. 2d at 523.

We conclude that the forum selection clause to which VWAG secured Klippan's agreement unambiguously designates the Wolfburg court of competent jurisdiction as the sole and exclusive forum to which either party must submit "all disputes that may arise" from the purchase orders for the seat belt assemblies at issue. The language is man-

datory. "Venue . . . *is* . . . *the* court" (emphasis added). This language compares closely with the mandatory and exclusive clause in *Bremen*, which states "[a]ny dispute arising must be treated before the London Court of Justice." 407 U.S. at 2, 32 L. Ed. 2d at 516. It is quite distinguishable from the permissive, nonexclusive clauses cited by VWAG. In *Engel* v. *Shubert Theatrical Co.*, 151 N.Y.S. 593, 594 (App. Div. 1915), the parties stated that they "agree to submit to the jurisdiction of the Vienna courts" in case of dispute. In *Reavis* v. *Exxon Corp.*, 396 N.Y.S.2d 774, 777 (App. Div. 1977), the city of Caracas was designated as "a special domicile . . . subject to the jurisdiction of the Courts of the Federal District."

We also conclude that the instant forum selection clause encompasses the subject matter of this dispute. VWAG characterizes its action as one for indemnity and contribution arising solely from Alaska statutory law and equitable principles rather than from contract. Yet VWAG's complaint in this action also alleges breach of express or implied warranties of merchantability and fitness for ordinary purposes. In *Bremen* the United States Supreme Court fully enforced a forum selection clause in the contract applicable to "any disputes arising" in an action alleging negligence in tort as well as breach of contract. 407 U.S. at 4, 32 L.Ed. 2d at 517. We further agree with the superior court's conclusion that any ambiguity in the clause in this regard should be resolved against the maker of the contract, VWAG. *See Zapata Marine Serice* v. *O/Y Finnlines Ltd.*, 571 F.2d 208, 209 (5th Cir. 1978).

VWAG also argues that the issue of the validity of the forum selection clause should not have been determined prior to its submission of affidavits as to the intent in drafting the provision. From the record it is clear that the question of ambiguity was raised and argued before the superior court prior to its dismissal of the action. VWAG had an opportunity at that time to present extrinsic evidence to aid interpretation of the clause, of which it did not take advantage.

Enforcing the forum selection clause against VWAG will not be unreasonable or against any public policy under the *Bremen* criteria. No evidence has been shown of unequal bargaining power or fraud which worked to the disadvantage of VWAG in negotiating the agreement. 407 U.S. at 12, 32 L.Ed. 2d at 522. VWAG contends that it is unlikely to obtain a remedy in the German forum, based on allegations in Klippan's complaint in its action in a German court that no right of contribution or indemnity based on strict liability exists. Yet VWAG has not denied that it has an opportunity to fully present its legal position in the German forum. The scanty materials on German law submitted to this court leave us unconvinced that a remedy will be unavailable to VWAG in Germany. VWAG's own pleadings in the pending German action maintain that Klippan is liable under German and Alaska law to indemnify VWAG for the amount of settlement with Dr. Munns. The only direct citation to German law furnished to this court provides for a right of contribution between "joint debtors." German Civil Code, Sec. 426, par. 1. Given this record we cannot conclude that VWAG has met its burden under *Bremen* of showing that enforcement of the clause will for all practicable purpose deprive it of its day in court.[11] And while we have determined that litigation of this case in Alaska would not be so unreasonable as to violate due process of law, it is not apparent to us that forcing VWAG to submit to German jurisdiction in a location convenient to the main parties in the action would be sufficiently inconvenient to allow VWAG to escape from the forum for which it originally bargained. Finally, because the record we have been furnished does not indicate a lack of an indemnity or con-

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[11] The bare pleadings and single citation to the German Civil Code in this case fall short of the evidence submitted in *Chem. Carriers Inc.* v. *L. Smit & Co.'s Internationale Sleepdienst,* 154 F. Supp. 886 (S.D.N.Y. 1957), cited by VWAG. In that case an opinion letter from counsel "stated to be learned in the Netherlands Law" explained that the remedy sought in the American jurisdiction would not be available in the foreign forum. 154 F. Supp. at 888-89.

tribution remedy in the German forum, we also conclude that the policy in favor of these remedies embodied in Alaska law will not be contravened by enforcement of the forum selection clause.

III. Forum Selection Clause and VWoA

We hold that the superior court erred in enforcing the forum selection clause against VWoA, however. VWoA was not a party to the purchase order contract between VWAG and Klippan. That an identical forum selection clause was agreed to by VWoA in its purchases of autos from VWAG is of no consequence. That forum selection clause applies to disputes concerning transactions between VWAG and VWoA, not VWAG and Klippan or VWoA and Klippan. Likewise, VWoA's status as a wholly-owned subsidiary of VWAG does not justify binding VWoA to VWAG's separate contractual agreement with Klippan. A subsidiary corporation is normally considered an entity separate and distinct from its parent. *Berger* v. *Columbia Broadcasting Systems, Inc.*, 453 F.2d 991, 994 (5th Cir.), *cert. denied*, 409 U.S. 848, 34 L. Ed. 2d 89 (1972). The fact that the parent corporation owns all of the stock issued by its subsidiary is not reason enough alone to disregard the separate legal identities of subsidiary and parent. *See Jackson* v. *General Elec. Co.*, 514 P.2d 1170 (Alaska 1973); *Edgar* v. *Fred Jones Lincoln Mercury*, 524 F.2d 162, 166 (10th Cir. 1975); *Berger* v. *Columbia Broadcasting Systems, Inc., supra*, at 994; *York Chrysler-Plymouth, Inc.* v. *Chrysler Credit Corp.*, 447 F.2d 786, 791 (5th Cir. 1971); *Royal Indus.* v. *St. Regis Paper Co.*, 420 F.2d 449, 453 (9th Cir. 1969); *Hanson Southwest Corp.* v. *Dal-mac Constr. Co.*, 554 S.W.2d 712, 716 (Tex. Civ. App. 1977); *Unijax, Inc.* v. *Factory Ins. Ass'n*, 328 So.2d 448, 454 (Fla. App. 1976). In *Jackson* v. *General Elec. Co., supra* at 1173, an action seeking to hold a parent corporation responsible for the tort of its subsidiary, this court described the limited circumstances which do warrant "piercing the corporate veil:"

> A parent corporation may be held liable for its subsidiary's conduct when the parent uses a separate cor-

> porate form to defeat public convenience, justify wrong, commit fraud, or defend crime. The parent corporation may also be liable for the wrongful conduct of its subsidiary when the subsidiary is the mere instrumentality of the parent. Liability is imposed in such instances simply because the two corporations are so closely intertwined that they do not merit treatment as separate entities.

See also Elliot v. *Brown,* 569 P.2d 1323 *(Alaska 1977); Bendix Corp.* v. *Adams,* _____ P.2d _____, Op. No. 2042 (Alaska, March 14, 1980). The party seeking to have the indemnity of parent and subsidiary corporation treated as one has the burden of proof to show that the necessary circumstances exist. *In Re Beck Industries,* 479 P.2d 410, 417 (2d Cir.), *cert. denied.* 414 U.S. 858, 38 L. Ed. 2d 108 (1973). Klippan has failed to present evidence that VWoA is a mere instrumentality of VWAG. Evidence in the record on the contrary shows that VWoA purchases autos outright from VWAG under contractual agreement and resells them to other distributors under separate contracts, as well as purchasing and selling on its own account autos and other products from manufacturers other than VWAG. VWoA is incorporated in a separate jurisdiction from VWAG, maintains its own separate records, owns property in its own name, conducts its own legal and financial affairs and in short carries on business as a separate entity from VWAG. WVoA contributed one-half of the settlement sum paid to Dr. Munns from its own funds. These factors — independence of the subsidiary in the conduct of its business, contractual definition of its relationship to the parent corporation, and adequate capitalization of the subsidiary — were considered important criteria in the determination of whether the subsidiary should be treated as a mere instrumentality of its parent corporation in *Jackson, supra.*[12] Thus Klippan has not met the

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[12] 514 P.2d at 1174. In *Jackson,* the following criteria to consider in determining whether a subsidiary corporation should be treated as an instrumentality of its parent were listed:

> (a) The parent corporation owns all or most of the capital stock of the subsidiary.

burden of proof required to subject VWoA to the forum selection provision of a contract entered into by VWAG and Klippan. *See, e.g. York Chrysler-Plymouth, Inc.,* v. *Chrysler Credit Corp.,* 447 F.2d 786, 791 (5th Cir. 1971), *Berger* v. *Columbia Broadcasting Systems, Inc.,* 453 F.2d 991 (5th Cir.), *cert. denied,* 409 U.S. 848, 34 L. Ed. 2d 89 (1972).

The decision of the Superior Court is Affirmed with respect to dismissal of VWAG's action and Reversed with respect to dismissal of VWoA's action. This case is remanded to the superior court for further proceedings in accordance with this opinion.

(b) The parent and subsidiary corporations have common directors or officers.

(c) The parent corporation finances the subsidiary.

(d) The parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation.

(e) The subsidiary has grossly inadequate capital.

(f) The parent corporation pays the salaries and other expenses or losses of the subsidiary.

(g) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation.

(h) In the papers of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own.

(i) The parent corporation uses the property of the subsidiary as its own.

(j) The directors or executives of the subsidiary do not act independently in the interest of subsidiary but take their orders from the parent corporation in the latter's interest.

(k) The formal legal requirements of the subsidiary are not observed.

514 P.2d at 1173. Another basis for treating parent and subsidiary as one, mentioned in *Jackson,* is when the subsidiary actsd as an agent of the parent for some purpose. 514 P.2d at 1173 n.8. This situation is not present in this case.

APPENDIX B

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

No. 77-4255

VOLKSWAGEN WERK, A.G., a/k/a VOLKSWAGEN WERK, AKTIENGESELLSCHAFT, a foreign corporation, and VOLKSWAGEN OF AMERICA, INC., a New Jersey corporation, *Plaintiffs,*

v.

KLIPPAN, GmhM, ALLIED CHEMICAL CORPORATION, and EVERETT DALE VAUGHN, *Defendants.*

Decision

September 15, 1978

Plaintiffs, Volkswagenwerk, A.G. and Volkswagen of American, Inc., had judgment entered against them as defendants in prior cause No. 74-5870. The special jury verdict in that case found strict liability in tort, based upon plaintiff's use, in the manufacture and sale of their vehicles, of a seatbelt buckle which released due to a defect and that the release of the buckle during an accident proximately caused injuries suffered by one Dr. Charles R. Munns, plaintiff in that action.

Plaintiffs in this action seek indemnity and contribution from defendants Klippan and Allied Chemical as manufacturer and supplier of the defective seat belt restraint systems. Volkswagenwerk A.G. (VWAG) purchased the components from Klippan in Germany for use in their automobiles. Volkswagen of American (VWoA) subsequently purchased the completed automobile from VWAG in Germany for distribution in the United States. (Note: The claim against defendant Everett Dale Vaughn was dismissed with prejudice by stipulation of the parties and order of this court, dated May 25, 1978.) Plaintiffs base their claim in this action on breach of implied or express warranty of merchantability or fitness for purpose, defective or negligent design, and

negligence or strict liability for failure to warn of any risks or danger posed by the produce provided. Defendant Klippan now moves to dismiss based on three affirmative defenses asserted by defendant in its answer to plaintiff's complaint:

Defendant's first afirmative defense is that this court lacks the requisite jurisdiction over this answering defendant. Personal jurisdiction over a foreign or out-of-state defendant whose products cause injury to person or property within this state is conferred by AS 09.05.015 et seq, Alaska's so-called "long-arm" statute. The Alaska long-arm statute has been construed to extend to the maximum reach consistent with the guarantees of due process under the Fourteenth Amendment. *Jonz* v. *Garett/Airesearch Corp.*, 490 P.2d 1197 (Alaska 1971).

The issue for decision is whether the application of Alaska's long-arm statute to the defendant, Klippan, in this case world violate due process principles. It is well established that a state may not render judgment against a non-resident, consistent with due process, in the absence of personal jurisdiction. *Pennoyer* v. *Neff,* 95 U.S. 714 (1877). Personal jurisdiction over a non-resident defendant, through a state's long-arm statute, requires certain minimum contacts with the state "so that maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington,* 326 U.S. 310(1945). Generally, to establish those minimum contacts, the defendant must have done some act by which he purposely availed himself of the privelege of conducting business within the forum state, thus invoking the benefits and protections of that state. *Hanson* v. *Denkla,* 375 U.S. 235 (1958).

Defendant Klippan argues that they have engaged in no conduct directly with Alaska for the purpose or with the result of involving the benefits and protections of Alaska law. Klippan suggests that their only contact with the state of Alaska can be that it manufactured one component part of a product that ultimately happened to enter the State of Alaska

and allegedly caused injury here. Klippan, however, was aware that certain of their products might reach the United States as evidenced by the fact that they communicated with federal and state agencies in order to obtain issuance of product approval certification for its belts.

The "stream of commerce" theory recognizes that it is reasonable for a manufacturer who has placed its product in commerce to defend actions in forums where it is foreseeable that the product may arrive. Thus, as in *Commodities World Int'l. Corp.* v. *Royal Milc., Inc.*, 440 F. Supp. 1373 (D.C. Puerto Rico 1977) at 1378:

> Foreseeability that a shipped product *may* eventually reach a state satisfies the requirement that a defendant puposely avails itself of conducting business activities within the forum state. (Emphasis added)

The Alaska Court has indicated approval of the stream of commerce theory in *Modern Trailer Sales, Inc.* v. *Traweek*, 561 P.2d 1192 (Alaska 1977), wherein the court used the following language from *Jones Enterprises, Inc.* v. *Atlas Service Corp.*, 442 F.2d 1136,1140 (9th Cir. 1971):

> It is sufficient that, as here, the defendant purposefully sets his product or his design into the stream of commerce, knowing or having reason to know that they will reach the forum state and that they create a potential risk of injury.

561 P.2d 1196. See also *Duple Motor Bodies Ltd.* v. *Hollingsworth*, 417 F.2d 231 (9th Cir. 1969).

Though defendant Klippan relies on a three step analysis suggested in *Amba Marketing Systems, Inc.* v. *Jobar International, Inc.*, 551 F.2d 784 (9th Cir. 1977), we feel that the analysis merely outlines the existing guidelines as developed by prior cases evidenced by the fact that the court made specific reference to the stream of commerce theory as precedent without any suggestion that it was overruled or superceded by *Amba*.

Klippan implies that, as a supplier of a component part, it is outside the reach of the stream of commerce theory. This argument is not supported by modern theories of products liability. It is not offensive to fair play or substantial justice to require a manufacturer to defend his product wherever he himself has placed it, either directly or through the normal distribution channels of trade. *Duple, supra,* at 235. A manufacturer should not be able to insulate himself from liability by using a complex network of distribution and thereby claim to direct contact. The use of a middleman must clearly indicate to a manufacturer that he is not selling to a user and, in fact, unless he imposes restrictions on his middlemen he expands his horizons of amenability to any state, since he willingly and knowingly enters into such an arrangement. *Commodities, supra,* at 1379. In addition, in *Dotterweich* v. *Yokohama International Corp.,* 416 F. Supp. 542 (D. Minn. 1976), the court stated in footnote 11 at 550:

> A party's status as a component part manufacturer does not in all instances foreclose the exercise of jurisdiction. Such an exercise of jurisdiction does not offend due process if minimum contacts are established.

See also *Sells* v. *International Harvester Co., Inc.,* 513 F.2d 762 (5th Cir. 1975). *Duple, supra.*

We find that defendant, Klippan, has sufficient minimum contacts with the State of Alaska through the placing of their seat belt restraint system in the general stream of commerce. It was altogether foreseeable that the seat belts would be employed in Volkswagens being shipped to the United States and was thus, not unforeseeable that they might eventually reach the State of Alaska. The fact that defendant was merely a component part manufacturer and did not directly engage in dealings with Alaska does not relieve them from answering in this state for injuries allegedly resulting from the use of their products here. These minimum contacts are sufficient to exercise personal jurisdiction over Klippan in the pending action consistent with the principles of due process.

Defendant's second affirmative defense is that this answering defendant and plaintiff, VWAG, entered into a contractual relationship whereby the plaintiff, VWAG, for itself and for VWoA, specified that all disputes would be determined under German law and in a specific German court. That parties are free to negotiate and contract the terms of their business dealings is the nature of the law of contracts. The parties to this action are both corporations who deal frequently with one another and there is offered no evidence that their dealings are anything but at arm's length.

By the terms of the agreement between them, in the form of a purchase order drafted by VWAG, venue for all disputes that result from VWAG's orders is the court of competent jurisdiction for Wolfsburg. It should be noted that the English translation of their agreement was provided by defendant, Klippan, but that plaintiffs do not contest its accuracy or offer the original into evidence. There is thus, no room to dispute the existence or content of the forum selection clause.

The current status of the law with regard to forum selection clauses centers around *M/S Bremen* v. *Zapata Offshore Co.*, 407 U.S. 1 (1972). The United States Supreme Court stated at 12:

> There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overwhelming bargaining power, such as that involved here, should be given full effect. . . .Manifestly such uncertainty and possible great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur. . . . The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade.

And it further stated, at 18:

> . . .It should be incumbent on the party seeking to escape his contract to show that trial in the contractual

> forum will be so greatly difficult and inconvenient that he will for all practicable purpose be deprived of his day in court. *Absent that, there is no basis for concluding that is would be unfair, unjust or reasonable to hold that party to his bargain.* (Emphasis added)

Plaintiffs argue that the forum selection clause does not apply to this action as it arose by operation of Alaska law, and is independent of any contractual relationship between VWAG and Klippan. In deed, there appears some dispute as to the actual scope of the clause with relationship to the present dispute. It must be noted, however, that VWAG drafted the forum selection provision as part of their purchase order. It is well established that when a contract provision is subject to opposing, yet reasonable interpretations, an interpretation is preferred which operates more strongly against the maker. *Zapata Marine Service* v. *O/Y Finnlines Ltd.*, 571 F.2d 208,209 (5th Cir. 1978). Thus, any ambiguity found to exist in that provision must be construed so as to prevent VWAG from avoiding the obligations of its own contract.

Plaintiffs further argue that application of the forum selection clause is against public policy and should not be enforced. The *Bremen* court suggests that questions of enforcement due to contravention of public policy are not controlling in international commercial agreements and cited with approval from the dissenting opinion in the Court of Appeals by Judge Wisdom:

> Two concerns underlie the rejections of exculpatory agreements (on public policy grounds): that they may be produced by overwhelming (sic) bargaining power; and that they do not sufficiently discourage negligence. . . .

After discussing the absence of any evidence in that case of overwhelming (sic) bargaining power, Judge Wisdom concluded:

> We should not invalidate a forum selection clause unless we are firmly convinced that we would thereby

> significantly encourage negligent conduct within the boundaries of the United States.

488 F.2d at 907-908. As stated previously, there exists no evidence in this case that one of the parties possessed any overwhelming bargaining power as against the other. In addition, there is no evidence offered supporting the conclusion that to uphold this forum selection agreement would in any way significantly encourage negligent conduct within this state or the boundaries of the United States as a result. We, therefore, find no basis for rejection of the agreement on public policy grounds.

Plaintiffs' final argument is that application of the forum selection clause would be unjust and unreasonable. As noted previously in a quote from *Bremen* at 18, the only basis for concluding that a clause would be unjust, unfair or unreasonable would be by a showing that the contractual forum will be so greatly difficult and inconvenient that for all practical purpose a party will be deprived of their day in court.

Plaintiffs' contention that they have no adequate remedy under German law is without merit. Litigation of these parties' rights is currently underway in the German courts. Both parties have appeared there and argued their respective positions. Regardless of any allegations or speculation regarding the outcome of that action, plaintiff may not claim that dismissal of this action will effectively deprive them of their day in court. We find that due to the ongoing litigation in Germany, application of the forum selection clause in this case is not unjust and unreasonable.

Therefore, the forum selection clause as drafted by VWAG and made a part of the purchase agreement between VWAG and Klippan is binding and must be given effect. The agreement is further applicable to VWoA as a wholly owned subsidiary of VWAG.

Because the second affirmative defense alleged by defendant, disposes of this case, we make no determination as to

the merits of defendant's third affirmative defense. The case is dismissed on the ground that the appropriate forum in this instance is the court of competent jurisdiction of Wolfsburg in accordance with the terms of the contract between the parties.

SO ORDERED.

Dated at Anchorage, Alaska this 15th day of September 1978.

/s/ PETER J. KALAMARIDES
Peter J. Kalamarides
Superior Court Judge

I certify that on this 15th day of September 1978 I mailed copies of the foregoing documents to Mr. David Thorsness and Mr. Joseph Young at their addresses of record.

/s/ SCARLETT O. WATTS
Scarlett O. Watts
Secretary

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

ATTEST: 9/18/78

/s/DONNA HOLMAN
Donna Holman
Clerk—Trial Courts
State of Alaska At Anchorage

APPENDIX C

Constitutional Provisions

Fourteenth Amendment To United States Constitution

Section 1. . . .No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Statutes

AS 09.05.015

(a) A court of this state having jurisdiction over the subject matter has jurisdiction over a person served in an action according to the rules of civil procedure. . . .

(4) in an action claiming injury to person or property in this state arising out of an act or omission out of this state by the defendant, provided, in addition, that at the time of the injury either.

(A) solicitation or service activities were carried on in this state by or on behalf of the defendant; or

(B) product, materials or things processed, serviced or manufactured by the defendant were used or consummed in this state in the ordinary course of trade;

Supreme Court, U. S.
FILED
SEP 29 1980
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IN THE

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KLIPPAN, GMBH,

Petitioner,

v.

VOLKSWAGEN OF AMERICA, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

This brief is submitted by respondent Volkswagen of America, Inc. ("VWoA") in opposition to the Petition for a Writ of Certiorari filed herein by petitioner Klippan, GmbH ("Klippan" or "petitioner").

Opinions Below

The opinion of the Alaska Supreme Court (Pet. App. 1a-15a) is reported at 611 P.2d 498. The opinion of the lower court (Pet. App. 16a-23a), the Superior Court for the State of Alaska, Third Judicial District, is unreported.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

Under the special circumstances of this case, as found by the courts below, including the fact that Klippan (1) manufactured and sold millions of its seat belts for resale in the United States without any limitation; (2) communicated with American federal and state agencies in order to procure approval for the sale of its product in the United States; (3) conformed its seat belts to satisfy Alaska safety requirements; and (4) actually labelled its product with the name "Klippan" as being approved for sale in the entire United States, the sole question raised by the Petition is:

> Did the State of Alaska, the place where the underlying accident occurred, properly exercise *in personam* jurisdiction over the petitioner?

In view of the controlling determinations of this Court, the review sought by the petitioner lacks merit and the petition should be denied.

Constitutional Provision and Statute Involved

The constitutional provision and statute involved are adequately set forth in the Petition.

Statement of the Case

At the outset it should be noted that Klippan omits from its Petition all references to its Alaska and United States related conduct and activities. The record discloses, however, that Klippan is a major manufacturer of seat belts. (R.323, 336).* Of the nearly eleven million seat belt

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* Citations to pages preceded by the letter "R" refer to the Record on Appeal before the Alaska Supreme Court.

assemblies sold by Klippan to ten automobile manufacturers for incorporation into their automobiles destined for sale and distribution into the United States (R.174-75, 627), over 700,000 seat belt assemblies were provided by Klippan to Volkswagenwerk A.G. ("VWAG")* for export to the United States. Each of these 700,000 seat belt assemblies were identical to the seat belt involved in the Munns accident.

To facilitate the sale of its product in the United States, Klippan communicated directly with American federal and state government agencies to obtain issuance of product approval certifications for its seat belt systems. (Pet. App. 18a). Klippan's further activities to insure that its product would be distributed in Alaska, as well as the rest of the United States, are succinctly set forth by the Alaska Supreme Court:

> "Klippan has sold millions of seat belt assemblies for incorporation into automobiles it knew were destined for purchase by consumers throughout the United States. Alaska law required installation of lap belts in all automobiles sold in this state during 1967, the model year of the Munns car. Klippan represented by a label sewn on the belt involved in the Munns accident that its restraint systems were 'approved for

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* VWAG and VWoA, the importer of Volkswagen vehicles into the United States, were defendants in the first stage of this litigation, the products liability lawsuit brought in Alaska by Dr. Munns. That case was settled and VWoA and VWAG commenced the present indemnity and contribution action against Klippan and its parent corporation, Allied Chemical Corporation. Based upon a forum selection clause in the contract between VWAG and Klippan, the courts below dismissed VWAG's claims. (611 P.2d at 504; Pet. App. 20a). However, the Alaska Supreme Court's determination, after extensive inquiry, that VWoA, as a separate and distinct corporate entity, was not bound by VWAG's forum selection provision, is based upon unassailable authority. (611 P.2d at 505-06, Pet. App. 13a-15a).

> sale in all states,' and took steps to insure that the belts complied with standards established by the American Society of Automotive Engineers. Klippan thus knew or had reason to believe that its seat belts could be distributed and sold for use in Alaska, and did not limit the sale or marketing of the restraint system in the United States." 611 P.2d at 500-01, Pet. App. 4a. (footnote omitted).

Finally, although the precise number of Klippan-equipped Volkswagen vehicles sold in Alaska during 1967 (the model year of the Munns automobile) has been disputed, the Alaska Supreme Court found that Klippan knew or should have known "that a number of Klippan-equipped vehicles would be sold directly for use in Alaska through dealerships here and in other states." 611 P.2d 501 n.5, Pet. App. 5a n.5.*

Based upon petitioner's extensive relationship with Alaska and the rest of the United States, the Alaska Supreme Court held that Klippan was subject to its jurisdiction:

> "where, as here, the component manufacturer deliberately designs its product in anticipation of it being widely marketed in American jurisdictions, and sells the component directly to several major auto producers with the knowledge that the component will be incorporated into their products and sold through-

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* It is significant that Klippan is insured in the United States by American insurance companies (R.360), and that Klippan has been held subject to the jurisdiction of the courts of California and Illinois. (R.337-38). Klippan limits its challenge to jurisdiction to the case where it is sued for contribution or indemnity. Klippan does not raise in this Court any contention that it would not have been subject to suit in Alaska directly by the plaintiff in the original lawsuit.

out America. The fact that Klippan did not directly engage in business dealings in Alaska does not relieve it from answering for injuries which may result from use of its product in this state. It was entirely foreseeable to Klippan, from its own conduct, that a number of its restraint systems would be purchased by consumers in Alaska through normal sales and distribution patterns in the United States." 611 P.2d at 501, Pet. App. 5a. (footnotes omitted).

Reasons for Denying the Writ

The decision of the Supreme Court of Alaska is fully consonant with the requirements of the Due Process Clause of the Fourteenth Amendment as articulated by this Court in *World-Wide Volkswagen Corp.* v. *Woodson,* 100 S.Ct. 559 (1980). Indeed this Court's *Woodson* opinion was carefully considered by the Alaska Supreme Court (611 P.2d at 501-02 n.6, Pet. App. 6a n.6) and the contacts referred to above were reviewed.

Consistent with *Woodson* and other controlling authorities, the Alaska Supreme Court weighed whether Klippan has "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hansen* v. *Denckla,* 357 U.S. 235, 253 (1958); *World-Wide Volkswagen Corp.* v. *Woodson, supra,* 100 S.Ct. at 567. It found that Klippan purposefully promoted the export of millions of its product to the United States. Klippan actively encouraged the exploitation of that market by specifically manufacturing and designing its seat belts to comply with the safety standards of all the states and the federal government. No seat belt could be sold in Alaska without satisfying Alaskan engineering and safety requirements.

Klippan thus sought out the benefits and protection derived from Alaska law, as well as those of all other states, when petitioner's finished product was engraved with the ubiquitous notice that it was "approved for sale in all states" and bore the name "Klippan" on a label in each seat belt. Under these facts, Klippan satisfies the criterion established by *Woodson.*

The record and opinions below amply demonstrate that Klippan's "conduct and connection with the forum State are such that [it] should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp.* v. *Woodson, supra,* 100 S.Ct. at 567.

Klippan in no way fits the fact pattern of the *Woodson* case where a local New York automobile dealer and wholesaler were found to have had no "contacts, ties or relations" with Oklahoma (100 S.Ct. at 568) because they never sold in Oklahoma or sought to serve the forum market (100 S.Ct. at 566). Jurisdiction in that case was denied because mere foreseeability is insufficient. In contrast, this is a case of specific contacts.

Nor can Klippan insulate itself from defending suit in Alaska merely by characterizing itself an alien manufacturer of component parts. Such wooden formulations for determining state court jurisdiction have long since been rejected by this Court. *See, International Shoe Co.* v. *Washington,* 326 U.S. 310, 319 (1945). Klippan's argument cannot overcome this Court's admonition in *World-Wide Volkswagen Corp.* v. *Woodson, supra,* 100 S.Ct. at 567, that where the sale of a product of a manufacturer or distributor

> "arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other states, it is not unreasonable

> to subject it to suit in one of those states if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its product into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. Compare *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961)."

Finally, the Alaska Supreme Court determined that the significant state interest of adjudicating the rights and liabilities of the maker of a defective product causing substantial personal injuries in the state was furthered by VWoA's indemnity action. 611 P.2d at 502, Pet. App. 6a-7a. *Woodson* confirmed this as a relevant jurisdictional factor. *World-Wide Volkswagen Corp.* v. *Woodson, supra,* 100 S.Ct. at 564.

The Alaska Supreme Court has faithfully applied the due process principles set forth by this Court. There is no conflict between the opinion of the Alaska Supreme Court and any decision of this Court.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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